

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

KIERAN RAVI BHATTACHARYA,

Plaintiff,

V.

Civil Action No. 3:19-CV-54-NKM-JCH

JAMES B. MURRAY, JR., et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO SEAL EXHIBIT 1
TO REGION TEN COMMUNITY SERVICES BOARD'S MOTION TO QUASH
SUBPOENA DUCES TECUM AND TO FILE OPPOSITION UNDER SEAL**

Defendants, by and through their undersigned counsel, state the following in support of their Motion to Seal Exhibit 1 to Region Ten Community Services Board's Motion to Quash Subpoena Duces Tecum (ECF No. 158-1) and to file their Opposition to Region Ten Community Services Board's Motion to Quash under seal pursuant to Local Rule 9 and 42 C.F.R. § 2.64(a):

I. RELEVANT BACKGROUND

On July 13, 2021, Defendants issued a subpoena duces tecum (“Subpoena”) to Region Ten Community Services Board (“Region Ten”) in connection with this matter. The Subpoena identifies the patient by name and date of birth. Region Ten moved to quash the Subpoena on July 26, 2021 (“MTQ”). (ECF No. 158). Exhibit 1 to the MTQ is a copy of the Subpoena. (ECF No. 158-1).

In their Opposition to the MTQ, Defendants ask the Court to order the production of the subpoenaed records for good cause pursuant to 42 C.F.R. § 2.64. The Opposition refers to the patient by name and discusses the contents of the medical records requested via the Subpoena.

The patient has not given written consent to disclosure of his or her information.

II. ARGUMENT

An application for disclosure of patient records under 42 C.F.R. § 2.64 must be filed under seal unless: (1) the patient has consented to the disclosure of his or her information in writing; or (2) the application uses a fictitious name and contains no patient identifying information. 42 C.F.R. § 2.64(a). The patient has not authorized the public release of his or her identifying information. Exhibit 1 to Region Ten's MTQ (ECF No. 158-1) and Defendants' Opposition to Region Ten's MTQ contain patient identifying information. Accordingly, Defendants ask that the Court seal Exhibit 1 to Region Ten's MTQ and Defendants' Opposition to Region Ten's MTQ pursuant to 42 C.F.R. § 2.64.

The Fourth Circuit has established certain steps a district court must take before documents within a case may be filed under seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000). Such an order will not be valid unless the district court (A) provides notice to the public and gives the public an opportunity to object to the sealing, (B) considers less drastic alternatives, and (C) provides specific findings in support of the decision to seal and the rejection of alternatives. *Id.* All of these prerequisites are satisfied here.

A. Public Notice

Contemporaneously filed with this Motion, Defendants have filed a Notice of this Motion to be docketed by the Clerk, which will provide the public with an opportunity to bring objections, if any, to sealing the documents that are the subject of this Motion. It is sufficient to docket the

notice “reasonably in advance of deciding the issue.” *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984).

B. Less Drastic Alternatives

No procedure other than sealing Exhibit 1 to Region Ten’s MTQ and Defendant’s Opposition to Region Ten’s MTQ will comply with 42 C.F.R. § 2.64 to avoid the public disclosure of patient identifying information. The patient has not consented to the release of his or her information. Using a fictitious name is impractical because Region Ten has already disclosed the patient’s name and date of birth by filing the Subpoena as an exhibit. Additionally, the arguments made in Defendants’ Opposition and application for disclosure require the identification of the patient by name and discussion of the content of the medical records. Thus, no other option for preserving the patient’s confidentiality besides sealing the proceedings is permissible under 42 C.F.R. § 2.64.

C. Specific Findings

Exhibit 1 to Region Ten’s MTQ and Defendant’s Opposition contain medical information that is protected from disclosure by 42 C.F.R. § 2.64(a). Protection of highly confidential information is appropriate and permissible in federal court. *See, e.g., Nixon v. Warner Commc’ns*, 435 U.S. 589, 598 (1978); *United States v. Doe*, 962 F.3d 139, 15-53 (4th Cir. 2020); *Hanwha Azdel v. C&D Zodiac*, No. 6:12-cv-00023, 2013 U.S. Dist. LEXIS 204728 (W.D. Va. Aug. 7, 2013) (granting motion to seal). Given that 42 C.F.R. § 2.64(a) requires the patient’s information to be protected from public view and the patient has not filed a written consent to the disclosure of his or her information the Court must seal the proceedings pursuant to federal regulation. Defendants, therefore, seek the sealing of Exhibit 1 to Region Ten’s MTQ and Defendant’s Opposition to Region Ten’s MTQ pursuant to Local Rule 9 and 42 C.F.R. § 2.64(a).

III. CONCLUSION

For these reasons, Defendants respectfully request that the Court grant their Motion to Seal and order the sealing of Exhibit 1 to Region Ten's MTQ (ECF No. 158-1) and Defendants' Opposition to Region Ten's MTQ.

Dated: August 12, 2021

Respectfully submitted,

/s/ Brittany A. McGill

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will deliver a notice of electronic filing to all counsel of record in this case.

/s/ Brittany A. McGill

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